

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JON C. AMEDEE,

No. C 13-3040 CW

Plaintiff,

ORDER GRANTING
MOTION TO DISMISS
(Docket No. 25),
GRANTING LEAVE TO
AMEND AND SETTING
CASE MANAGEMENT
CONFERENCE

v.

CITIMORTGAGE, INC.; MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC.; MORGAN STANLEY; and DOES 1-
50,

Defendants.

Plaintiff Jon C. Amedee asserts various mortgage-related claims against Defendants Citimortgage, Inc. (CMI), Mortgage Electronic Registration Systems, Inc. (MERS), and Morgan Stanley.¹ CMI moves to dismiss Plaintiff's first amended complaint (1AC). Plaintiff has filed an opposition.² The Court took the motion under submission on the papers. Having considered the arguments

¹ There is no indication that Plaintiff has served Defendants MERS or Morgan Stanley in accordance with Federal Rule of Civil Procedure 4(m). Rule 4(m) requires service on a defendant within 120 days after the complaint is filed. Plaintiff shall serve MERS and Morgan Stanley within fourteen days of the date of this order, or Plaintiff's claims against them will be dismissed without prejudice for failure to prosecute. The Court notes that many of the claims against MERS and Morgan Stanley can likely be dismissed for the same reasons that they are dismissed against CMI.

² Plaintiff's opposition appears to be cut and pasted from the opposition to a demurrer in another case. The caption page of the opposition indicates that opposition is to a demurrer filed by parties including EMC Mortgage Corporation, J.P. Morgan Chase and Chase Home Finance, none of which are involved in the instant case. The text of the opposition discusses the actions of U.S. Bank, which also is not involved in the instant case. Moreover, the opposition discusses causes of action not alleged in the 1AC and arguments not raised in CMI's motion to dismiss. Accordingly, the Court does not address the arguments raised in the opposition.

presented by the parties, the Court GRANTS the motions to dismiss and GRANTS Plaintiff leave to amend.

BACKGROUND

I. Facts

The following summary is taken from certain documents of which the Court takes judicial notice.³

In September 2003, Plaintiff obtained a refinance loan funded by Wausau Mortgage Corporation in the principal amount of \$219,000. Request for Judicial Notice (RFJN), Ex. A. The loan was secured by a deed of trust encumbering the real property located at 9012 Palmera Court, Oakland California. Id. The beneficiary of the deed of trust was MERS. Id. In July 2006, MERS assigned its beneficial interest in the deed of trust to CMI. RFJN, Ex. B.

Between July 2006 and August 2008, four notices of default were recorded on Plaintiff's loan. RFJN, Exs. C, E, G, H, J and K. Each of those notices was rescinded. RFJN, Exs. D, F, I, L. In May 2009, Plaintiff entered into a Loan Modification Agreement with CMI. On August 20, 2010, another notice of default was recorded on Plaintiff's loan. RFJN, Ex. N. On the same date, a substitution of trustee was recorded, substituting CR Title for CMI as trustee under the deed of trust. RFJN, Ex. O.

On November 22, 2010, CR Title executed a notice of trustee's sale. RFJN, Ex. P. On January 13, 2011, the property was sold at

³ CMI asks, and Plaintiff does not oppose, that the Court take judicial notice of various recorded documents associated with Plaintiff's purchase of the property, his refinance of his mortgage, and the foreclosure sale. The Court GRANTS CMI's request.

1 the trustee's sale to the Federal National Mortgage Association.
2 RFJN, Ex. Q. It appears that Plaintiff is still living in the
3 foreclosed upon property.

4 II. Procedural history

5 Plaintiff initiated this case on May 31, 2013 in Alameda
6 County Superior Court, naming CMI as the only Defendant. On July
7 2, 2013, CMI removed the action to federal court.⁴ Docket No. 1.

8 On July 9, 2013, CMI filed a motion to dismiss Plaintiff's
9 complaint and a motion to strike certain portions of Plaintiff's
10 complaint. Docket Nos. 8, 9. On August 6, 2013, CMI filed a
11 notice that its motions to dismiss and strike had not been
12 opposed. Docket No. 17, 19. On August 14, 2013, Plaintiff filed
13 oppositions to CMI's motion and his 1AC, adding as Defendants MERS
14 and Morgan Stanley. The 1AC asserts thirteen claims against all
15 Defendants: (1) unfair business practices in violation of
16 California's Unfair Competition Law (UCL); (2) breach of the
17 covenant of good faith and fair dealing; (3) slander of title; (4)
18 alter ego liability; (5) breach of contract; (6) unjust
19 enrichment; (7) another claim of unfair business practices in
20 violation of § 17200; (8) predatory lending; (9) violation of
21 California Civil Code section 2923.5; (10) defamation; (11) false
22 light; (12) to void or cancel assignment of dead of trust; and
23 (13) cancellation of a voidable contract.

24 AS CMI notes, the deadline for Plaintiff to file an amended
25 complaint without leave of court was July 30, 2013, twenty-one

26 ⁴ As of that date, CMI had not been served with the Superior
27 Court complaint. Accordingly, its notice of removal was timely
28 under 28 U.S.C. § 1446(b).

1 days after CMI served its motion to dismiss. See Fed. Rule Civ.
2 P. 15(a)(1)(B). Plaintiff's 1AC was not timely. Nevertheless,
3 the parties have fully briefed a motion to dismiss the 1AC.
4 Moreover, Plaintiff is a pro se litigant and Rule 15(a)(2)
5 provides that courts "should freely give leave [to amend] when
6 justice so requires." Accordingly, the Court grants Plaintiff
7 leave to file his 1AC.

8 CMI has also filed a motion to strike. Docket No. 26. The
9 Court DENIES the motion to the extent CMI seeks to strike
10 Plaintiff's complaint in its entirety based on its late filing.
11 Because the Court dismisses each of the claims in the 1AC, the
12 Court DENIES the motion to strike as moot to the extent it seeks
13 to strike particular paragraphs of the complaint.

14 LEGAL STANDARD

15 A complaint must contain a "short and plain statement of the
16 claim showing that the pleader is entitled to relief." Fed. R.
17 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
18 state a claim, dismissal is appropriate only when the complaint
19 does not give the defendant fair notice of a legally cognizable
20 claim and the grounds on which it rests. Bell Atl. Corp. v.
21 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
22 complaint is sufficient to state a claim, the court will take all
23 material allegations as true and construe them in the light most
24 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
25 896, 898 (9th Cir. 1986). However, this principle is inapplicable
26 to legal conclusions; "threadbare recitals of the elements of a
27 cause of action, supported by mere conclusory statements," are not
28

1 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
2 (citing Twombly, 550 U.S. at 555).

3 A statute of limitations defense may be raised by a motion to
4 dismiss if the running of the relevant statute of limitations is
5 apparent on the face of the complaint. Ledesma v. Jack Stewart
6 Produce, Inc., 816 F.2d 482, 484 n.1 (9th Cir. 1987). When a
7 motion to dismiss is based on the running of a statute of
8 limitations, the motion can be granted "only if the assertions of
9 the complaint, read with the required liberality, would not permit
10 the plaintiff to prove that the statute was tolled." Jablon v.
11 Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980) (citation
12 omitted).

13 When granting a motion to dismiss, the court is generally
14 required to grant the plaintiff leave to amend, even if no request
15 to amend the pleading was made, unless amendment would be futile.
16 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
17 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
18 amendment would be futile, the court examines whether the
19 complaint could be amended to cure the defect requiring dismissal
20 "without contradicting any of the allegations of [the] original
21 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
22 Cir. 1990).

23 DISCUSSION

24 I. Unfair Competition Law--Claims 1 and 7

25 CMI moves to dismiss Plaintiff's first and seventh causes of
26 action for violation of the UCL. The UCL prohibits "any unlawful,
27 unfair or fraudulent business act or practice." Cal. Bus. & Prof.
28 Code § 17200. The UCL incorporates other laws and treats

violations of those laws as unlawful business practices independently actionable under state law. Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). Violation of almost any federal, state or local law may serve as the basis for a UCL claim. Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39 (1994). In addition, a business practice may be "unfair or fraudulent in violation of the UCL even if the practice does not violate any law." Olszewski v. Scripps Health, 30 Cal. 4th 798, 827 (2003). Under the UCL, "a fraudulent business practice is one in which members of the public are likely to be deceived." Morgan v. AT&T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1254 (2009).

Plaintiff's first cause of action alleges, "By failing to comply with the legal prerequisites for foreclosure proceedings, defendants, and each of them, are engaging in unfair business practices such as to justify the relief sought under the UCL."

1AC ¶ 37. Plaintiff's seventh cause of action alleges that he is informed and believe[s] and thereon allege[s] that defendants continue in their fraudulent business which include but are not limited to: 1) promising homeowners loan modifications that defendants have no intention of actually providing; 2) by routinely issuing NOD's without first complying with the legal requirements of California Civil Code section 2923.5; 3) by repeatedly demanding documentation from borrowers with full knowledge or in reckless disregard of the fact that said documentation had already been provided; 4) by continuing to demand and accept mortgage payments that have in fact foreclosed; 5) by intentionally misleading Plaintiffs' [sic] into believing that a foreclosure had not occurred or that one had been entered in "error."

1AC ¶ 59.

Defendant argues that both of Plaintiff's UCL claims fail for several reasons. First, Defendant argues that Plaintiff lacks

1 standing to bring a UCL claim. California Business and
2 Professions Code section 17204 requires a plaintiff "to show that
3 she has lost money or property sufficient to constitute an injury
4 in fact under Article III of the Constitution, and also requires a
5 causal connection between [the] alleged UCL violation and [the
6 plaintiff's] injury in fact." Rubio v. Capital One Bank, 613 F.3d
7 1195, 1204 (9th Cir. 2010) (internal quotation marks and citations
8 omitted). Defendant asserts that Plaintiff has failed to allege
9 "any conduct . . . on the part of CMI resulting in any loss of
10 money or property." Motion to Dismiss at 6. However, Plaintiff
11 has clearly alleged that the foreclosure was a result of
12 Defendants' alleged actions. Accordingly, to the extent that
13 Plaintiff has alleged actionable misconduct by CMI, Plaintiff has
14 alleged facts sufficient to establish his standing to pursue a UCL
15 claim.

16 A. Unlawful Business Practice

17 Plaintiff alleges that Defendant committed "violations of
18 Home Owners Loan Act of 1933, 12 USC 1461," "fail[ed] to comply
19 with the legal prerequisites for foreclosure proceedings," and
20 issued notices of default "without complying with the legal
21 requirements of California Civil Code section 2923.5" 1AC
22 ¶¶ 18(b), 37, 59. These broad assertions, unsupported by factual
23 allegations are not sufficient to establish a UCL cause of action.

24 B. Fraudulent Business Practices

25 "A fraudulent business practice is one in which members of
26 the public are likely to be deceived." Morgan, 177 Cal. App. 4th
27 at 1254. Claims premised on fraudulent lending practices must
28 satisfy Rule 9(b). Tayag v. Nat'l City Bank, 2009 U.S. Dist.

1 LEXIS 33260, *6 (N.D. Cal.). Plaintiff's UCL claim based on
2 fraudulent business practices is dismissed because the allegations
3 regarding these practices lack the required particularity.
4 Plaintiff does not specify what role, if any, CMI played in any of
5 the alleged misrepresentations or concealments. Moreover,
6 Plaintiff does not plead with particularity any of the false or
7 misleading statements.

8 C. Unfair Business Practices

9 To support his claim for unfair business practices, Plaintiff
10 alleges that Defendants failed to comply "with the legal
11 prerequisites for foreclosure proceedings." 1AC ¶ 37. The Court
12 presumes that the injury Plaintiff seeks to remedy is the
13 foreclosure sale of his home.

14 To amount to an unfair business practice (1) the injury must
15 be substantial; (2) the injury must not be outweighed by any
16 countervailing benefits to consumers or competition; and (3) the
17 injury must be one that the consumer could not reasonably have
18 avoided. Camacho v. Automobile Club of Southern California, 142
19 Cal. App. 4th 1394, 1402 (2006) (adopting one of three possible
20 definitions of unfair business practice).

21 Plaintiff's claim fails under the Camacho test. The alleged
22 injury suffered by Plaintiff--the foreclosure sale--even if caused
23 by Defendants, could have been avoided if Plaintiff had made
24 timely mortgage payments. See Camacho, 142 Cal. App. 4th at 1406
25 (even if plaintiff alleged he was injured, fact is that he could
26 have avoided action taken by defendants by obtaining insurance as
27 the law requires).

1 Therefore, Plaintiff fails to state a claim under the
2 unfairness prong of the UCL.

3 Plaintiff's UCL claims are dismissed. Plaintiff is granted
4 leave to amend to cure the noted deficiencies, if he can
5 truthfully do so.

6 II. Breach of the Implied Covenant of Good Faith and Fair Dealing

7 Plaintiff alleges, "Because the parties stood in the
8 relationship of Consultant and Client, Plaintiff was in a
9 vulnerable and dependent position, of which Defendants were
10 aware." 1AC ¶ 38. Plaintiff further alleges that Defendants
11 "committed a breach of the implied covenant of good faith and fair
12 dealing." 1AC ¶ 39.

13 "Generally every contract . . . imposes upon each party a
14 duty of good faith and fair dealing in its performance and its
15 enforcement." McClain v. Octagon Plaza, LLC, 159 Cal. App. 4th
16 784, 799 (2008) (internal quotation marks and citations omitted).
17 However, under California law, "no cause of action for the
18 tortious breach of the implied covenant of good faith and fair
19 dealing can arise unless the parties are in a 'special
20 relationship' with 'fiduciary characteristics.'" Pension Trust
21 Fund v. Federal Ins. Co., 307 F.3d 944, 955 (9th Cir. 2002)
22 (citing Mitsui Mfrs. Bank v. Superior Court, 212 Cal. App. 3d 726,
23 730 (1989)). "A central test of whether a lender is subject to
24 this tort is whether there is a fiduciary relationship in which
25 the financial dependence or personal security by the damaged party
26 has been entrusted to the other." Id.

27 Although Plaintiff suggests that a special relationship
28 exists between the parties, describing the relationship as that of

1 "Consultant and Client," California courts have specifically held
2 that "a lender does not owe a borrower or third party any duties
3 beyond those expressed in the loan agreement, excepting those
4 imposed due to special circumstances." Resolution Trust Corp. v.
5 BVS Development, Inc., 42 F.3d 1206, 1214 (9th Cir. 1994) (citing
6 Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d 1089,
7 1096 (1991)). "Special circumstances" giving rise to such duties
8 may exist when a "lender actively participates in the financed
9 enterprise beyond the domain of the usual money lender." Nymark,
10 231 Cal. App. 3d at 1089. Plaintiff has not alleged that CMI has
11 done so.

12 Moreover, "to state a claim for breach of the implied
13 covenant of good faith and fair dealing, a plaintiff must identify
14 the specific contractual provision that was frustrated."
15 Reiydelle v. J.P. Morgan Chase Bank, N.A., 2014 U.S. Dist. LEXIS
16 10543, *29 (N.D. Cal.). Plaintiff has not identified any such
17 provision.

18 Accordingly, the Court dismisses Plaintiff's claim for breach
19 of the implied covenant of good faith and fair dealing. Plaintiff
20 is granted leave to amend the deficiencies noted above if he can
21 do so truthfully and without contradicting the allegations in his
22 prior pleadings.

23 III. Slander of Title

24 In Plaintiff's third cause of action for slander of title, he
25 seeks "a judicial declaration declaring that the recording of the
26 Notice of Default and Notice of Sale constitutes a cloud of
27 Plaintiffs' title; and the same be declared invalid and expunged."
28 1AC ¶ 46.

1 "Slander or disparagement of title occurs when a person,
2 without a privilege to do so, publishes a false statement that
3 disparages title to property and causes the owner thereof 'some
4 special pecuniary loss or damage.'" Sumner Hill Homeowners'
5 Assn., Inc. v. Rio Mesa Holdings, 205 Cal. App. 4th 999, 1030
6 (2012) (quoting Fearon v. Fodera, 169 Cal. 370, 379-80 (1915)).
7 The elements of a claim for slander of title under California law
8 are (1) publication, (2) falsity, (3) absence of privilege and
9 (4) "'disparagement of another's land which is relied upon by a
10 third party and which results in a pecuniary loss.'" Smith v.
11 Commonwealth Land Title Ins. Co., 177 Cal. App. 3d 625, 630 (1986)
12 (quoting Appel v. Burman, 159 Cal. App. 3d 1209, 1214 (1984)).
13 Under California law, the "mailing, publication, and delivery of
14 notices" required as part of the nonjudicial foreclosure process
15 are considered privileged communications. See Cal. Civ. Code
16 § 2924(d)(1). Therefore, Plaintiff must also allege that the
17 recording was done with malice, that is, that it "was motivated by
18 hatred or ill will" or "the defendant lacked reasonable grounds
19 for belief in the truth of the publication and therefore acted in
20 reckless disregard of the plaintiff's rights." Kachlon v.
21 Markowitz, 168 Cal. App. 4th 316, 336 (2008) (internal quotations
22 omitted).

23 Plaintiff simply alleges that Defendants violated various
24 federal and state laws in their dealings with him and that the
25 recording of the notice of sale "was in violation of statutory
26 rules governing foreclosure sales, and the Trustee and beneficiary
27 both failed to follow the statutory rules for a valid foreclosure
28 under the California Civil Code and the intended or purported

1 foreclosure sale, is therefore, void." 1AC ¶ 43. Plaintiff has
2 not identified any evidence of falsity. Even assuming that CMI
3 violated laws and regulations in its dealings with Plaintiff,
4 Plaintiff has not alleged that CMI did not have the authority to
5 enforce the terms of the deed of trust when Plaintiff defaulted on
6 the loan. Moreover, Plaintiff has made no allegations of malice.

7 Accordingly, the Court DISMISSES Plaintiff's claim for
8 slander of title. Plaintiff is granted leave to amend the
9 deficiencies noted above if he can do so truthfully and without
10 contradicting the allegations in his prior pleadings.

11 IV. Alter Ego Liability

12 In his fourth cause of action, Plaintiff alleges that CMI is
13 "the alter ego of defendant Morgan Stanley." 1AC ¶ 48. "A claim
14 against a defendant, based on the alter ego theory, is not itself
15 a claim for substantive relief . . ., but rather, procedural,
16 i.e., to disregard the corporate entity as a distinct defendant
17 and to hold the alter ego individuals liable on the obligations of
18 the corporation where the corporate form is being used by the
19 individuals to escape personal liability, sanction a fraud, or
20 promote injustice." Hennessey's Tavern, Inc. v. American Air
21 Filter Co., 204 Cal. App. 3d 1351, 1359 (1988).

22 The Court DISMISSES Plaintiff's claim for alter ego
23 liability. Because Plaintiff cannot cure the deficiencies of this
24 claim by amending his complaint, the claim is dismissed with
25 prejudice.

26 V. Breach of Contract

27 Plaintiff alleges that he attempted to modify his loan in
28 June 2011 but "Defendant refused to agree to reasonable debt

1 reduction terms and conditions sufficient to validate a viable
2 loan adjustment plan." 1AC ¶ 51. Plaintiff further alleges,

3 By performing the acts described herein, Defendants
4 continually breached their contractual obligations under
5 the loan modification agreement(s). Despite demand,
6 Defendants refused to adjust the loan to present market
7 value with a resulting reduction in monthly mortgage
8 payments. Plaintiffs have complied with all covenants
9 and conditions except for those but for the breaches,
10 suppression, concealment and wrongful acts of
11 defendants, we were prevented from performing.

12 1AC ¶ 52.

13 "The elements of a cause of action for breach of contract
14 are: 1) the existence of the contract; 2) performance by the
15 plaintiff or excuse for nonperformance; 3) breach by the
16 defendant; and 4) damages." McNeary-Calloway v. JP Morgan Chase
17 Bank, N.A., 863 F. Supp. 2d 928, 954 (N.D. Cal. 2012).

18 According to the 1AC, the only contract that exists between
19 CMI and Plaintiff is the 2009 loan modification agreement.
20 Plaintiff does not identify any terms of the 2009 loan
21 modification agreement that required CMI to modify Plaintiff's
22 loan further upon "demand" by Plaintiff. Accordingly, Plaintiff
23 has not plead sufficient facts to support a claim that Defendant
24 breached the contract. Moreover, Plaintiff only makes a bare
25 assertion that any failure to perform on his part was excusable.
26 However, Plaintiff also alleges that he only "maintain[ed] a
27 history of consistent timely monthly mortgage payments until it
28 became economically impossible to meet the monthly obligation."
1AC ¶ 29. Plaintiff alleges that the "cost of maintenance,
upkeep, insurance, repairs, and taxes are constantly increasing."
Id. These allegations contradict his assertion that any non-
payment was excused.

1 Accordingly, the Court DISMISSES Plaintiff's fifth cause of
2 action for breach of contract. Plaintiff is granted leave to
3 amend the deficiencies noted above if he can do so truthfully and
4 without contradicting the allegations in his prior pleadings.

5 VI. Unjust Enrichment

6 CMI argues that Plaintiff cannot state a claim for unjust
7 enrichment because it is not a cause of action but rather a
8 general principle underlying various doctrines and remedies.

9 California courts are split as to whether there is an
10 independent cause of action for unjust enrichment. Baggett v.
11 Hewlett-Packard Co., 582 F. Supp. 2d 1261, 1270-71 (C.D. Cal.
12 2007) (applying California law). One view is that it is a general
13 principle underlying various legal doctrines and remedies.
14 McBride v. Boughton, 123 Cal. App. 4th 379, 387 (2004). Another
15 view is that it is a cause of action and its elements are receipt
16 of a benefit and unjust retention of the benefit at the expense of
17 another. Lectrodryer v. SeoulBank, 77 Cal. App. 4th 723, 726
18 (2000). Determining whether it is unjust for a person to retain a
19 benefit may involve policy considerations. First Nationwide Sav.
20 v. Perry, 11 Cal. App. 4th 1657, 1663 (1992).

21 To support his unjust enrichment claim, Plaintiff alleges,
22 "By their wrongful acts and omissions, all named defendants have
23 been unjustly enriched at the expense of Plaintiff, and thus
24 Plaintiff ha[s] been unjustly deprived." 1AC ¶ 54. Plaintiff
25 seeks "an order of the Court disgorging all profits, benefits, and
26 other compensation obtained by these defendants from their
27 wrongful conduct." 1AC ¶ 55.
28

1 However, the relationship between Plaintiff and Defendant is
2 governed by a contract. Under California law, "unjust enrichment
3 is an action in quasi-contract, which does not lie when an
4 enforceable, binding agreement exists defining the rights of the
5 parties." Paracor Fin., Inc. v. GE Capital Corp., 96 F.3d 1151,
6 1167 (9th Cir. 1996) (citing Wal-Noon Corp. v. Hill, 45 Cal. App.
7 3d 605, 613 (1975)).

8 Accordingly, the Court dismisses Plaintiff's unjust
9 enrichment claim. Because the claim cannot be amended to cure the
10 defect, the dismissal is with prejudice.

11 VII. Predatory Lending

12 Plaintiff's eighth cause of action alleges a claim for
13 "Predatory Lending Violation of Truth in Lending." 1AC at 17.
14 The cause of action does not cite either the federal Truth in
15 Lending Act or California's Predatory Lending Act. Nonetheless,
16 the factual allegations made in support of this claim concern
17 "closing costs" and lack of disclosure of "a yield spread premium
18 paid directly or indirectly, in whole or in part to a mortgage
19 loan officer." 1AC ¶ 63. As CMI points out, it was not involved
20 in the origination of the loan. Accordingly, this claim must be
21 dismissed. Plaintiff also alleges on information and belief that
22 "defendants committed other acts which rise to the level of
23 predatory lending." 1AC ¶ 64. If Plaintiff is able truthfully to
24 allege specific actions by CMI to support a predatory lending
25 claim, he may do so in an amended complaint.

26 VIII. Violation of California Civil Code section 2923.5

27 Plaintiff's ninth cause of action alleges a violation of
28 California Civil Code section 2923.5. However, the California

1 courts have held that the private right of action under section
2 2923.5 "is limited to obtaining a postponement of an impending
3 foreclosure to permit the lender to comply with section 2923.5."
4 Mabry v. Superior Court, 185 Cal. App. 4th 208, 214 (2010). The
5 foreclosure sale took place in January 2011. Accordingly,
6 Plaintiff cannot seek relief under section 2923.5.

7 Plaintiff's ninth cause of action also requests declaratory
8 relief. When a claim for declaratory relief is removed to federal
9 court, the court must conduct its analysis under the Declaratory
10 Judgment Act (DJA). See Golden Eagle Ins. Co. v. Travelers Cos.,
11 103 F.3d 750, 753 (9th Cir. 1996), overruled on other grounds by
12 Gov't Emps. Ins. v. Dizol, 133 F.3d 1220 (9th Cir. 1998); see also
13 Gamble v. GMAC Mortgage Corp., 2009 WL 400359, at *2 (N.D. Cal.).
14 The DJA permits a federal court to "declare the rights and other
15 legal relations" of parties to "a case of actual controversy." 28
16 U.S.C. § 2201; see Wickland Oil Terminals v. Asarco, Inc., 792
17 F.2d 887, 893 (9th Cir. 1986). The "actual controversy"
18 requirement of the DJA is the same as the "case or controversy"
19 requirement of Article III of the United States Constitution.
20 American States Ins. Co. v. Kearns, 15 F.3d 142, 143 (9th Cir.
21 1993). There is no current case or controversy between Plaintiff
22 and CMI with respect to his section 2923.5 claim. As discussed
23 above, the foreclosure sale already took place.

24 The Court dismisses Plaintiff's section 2923.5 claim.
25 Because the claim cannot be amended to cure the defect, the Court
26 dismisses the claim with prejudice.

IX. Defamation

Plaintiff's tenth cause of action is a claim for defamation. Under California law, a claim for defamation requires the intentional publication of a fact that is false, unprivileged, and has a tendency to injure. Cal. Civil Code §§ 44-46. Plaintiff alleges, "By making the false statements to credit reporting agencies as noted above, defendants made false allegations which have damaged their credit and have in fact caused injury to their reputation as a result." 1AC ¶ 73. However, there is no discussion anywhere else in the complaint of any false statements made by CMI to any credit reporting agency. Accordingly, Plaintiff has failed to allege the publication of any false statements.

Defendant also argues that Plaintiff's defamation claim is preempted by the Fair Credit Reporting Act (FCRA). However, the FCRA preempts claims of defamation against a person who furnishes information to a consumer reporting agency unless the false information is furnished with malice or willful intent to injure a consumer. 15 U.S.C. § 1681h(e). Plaintiff alleged that any false information was provided with malice.

The Court dismisses Plaintiff's tenth cause of action. Plaintiff is granted leave to amend the deficiencies noted above if he can do so truthfully and without contradicting the allegations in his prior pleadings.

X. False Light

Plaintiff next alleges that Defendants invaded his privacy by placing him in a false light when they "published the aforementioned information to others." 1AC ¶ 84. Under

1 California law, there are three elements of a claim for invasion
2 of privacy. There must be a public disclosure of private facts
3 and "the matter made public must be one which would be offensive
4 and objectionable to a reasonable person of ordinary
5 sensibilities." Sipple v. Chronicle Publ'g Co., 154 Cal. App. 3d
6 1040, 1045 (1984).

7 Plaintiff has not alleged which private facts were disclosed
8 or that such disclosure was offensive. Accordingly, the Court
9 dismisses this claim. Plaintiff is granted leave to amend the
10 deficiencies noted above if he can do so truthfully and without
11 contradicting the allegations in his prior pleadings.

12 XI. Claim to Void or Cancel Assignment of Deed of Trust

13 Plaintiff's twelfth cause of action alleges, "The assignment
14 of the deed of trust is invalid, and of no force and effect, for
15 the reasons set forth above including, inter alia, the facts that
16 CITIMORTGAGE, INC., MERS, MORGAN STANLEY nor any of the
17 foreclosing defendants did not have standing or the legal
18 authority to assign the deed of trust which purportedly secured
19 the Note, and which severed [sic] as the basis for a claim to have
20 the right to conduct a non-judicial foreclosure. Thus, the
21 assignment of the deed of trust was at all times void." 1AC ¶ 91.
22 Plaintiff alleges no facts to support his claim that any of the
23 assignments of the deed of trust was conducted without legal
24 authority. Accordingly, the Court dismisses this claim.
25 Plaintiff is granted leave to amend the deficiencies noted above
26 if he can do so truthfully and without contradicting the
27 allegations in his prior pleadings.
28

XII. Cancellation of a Voidable Contract

Plaintiff's thirteenth cause of action seeks to void the assignment of the deed of trust from MERS to CMI. Plaintiff alleges that MERS was operating in California "without registering as a foreign corporation to avoid paying taxes to the state." 1AC ¶ 95. On that basis, Plaintiff asserts that the deed of trust "is voidable by Plaintiffs pursuant to Rev & Tax Code §§ 23304.1, 23304.1(b), and 23305a." 1AC ¶ 96.

Assuming without deciding that MERS should have been registered with the state of California at the time it transferred the deed of trust to CMI in 2006, its failure to register was forgiven as of July 21, 2010, the date it registered with the state. "California courts have held that an unregistered corporation, upon registering, 'is restored to full legal competency and [has] its prior transactions given full effect.'". Perlas v. Mortgage Elec. Registration Systems, Inc., 2010 WL 3079262, *7 (N.D. Cal.) (quoting United Medical Management Ltd. v. Gatto, 49 Cal. App. 4th 1732, 1741 (1996)) (alterations in original). According to the California Secretary of State's online records, MERS has maintained an active registration since July 21, 2010.

Accordingly, the Court dismisses Plaintiff's thirteenth cause of action. Because any amendment would be futile, the dismissal is with prejudice.

CONCLUSION

For the reasons set forth above, the Court GRANTS CMI's motion to dismiss (Docket No. 25) and DENIES CMI's motion to strike (Docket No. 26). Within fourteen days of the date of this

1 order, Plaintiff may file a second amended complaint to remedy the
2 deficiencies identified above. He may not add further claims or
3 allegations not authorized by this order, nor may he replead the
4 claims that have been dismissed with prejudice.

5 If Plaintiff files a second amended complaint, Defendant
6 shall respond to it within fourteen days after it is filed. If
7 Defendant files a motion to dismiss, Plaintiff shall respond to
8 the motion within fourteen days after it is filed. Plaintiff must
9 file a brief that responds only to the arguments raised in
10 Defendant's motion. If Plaintiff files an opposition that is
11 inapplicable to this case or does not respond to Defendant's
12 arguments, the Court will consider the motion to be unopposed and
13 will grant it. Defendant's reply, if necessary, shall be due
14 seven days thereafter. Any motion to dismiss will be decided on
15 the papers.

16 The Court sets a case management conference for May 28, 2014
17 at 2:00 p.m.

18 IT IS SO ORDERED.

19
20 Dated: 3/17/2014


CLAUDIA WILKEN
United States District Judge